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Shared natural resources: feasibility of future work on oil and gas

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I. Introduction

1. The International Law Commission, at its fifty-fourth session, in 2002, decided to include the topic "Shared natural resources" in its programme of work and appointed Chusei Yamada as Special Rapporteur on the issue.[1] A Working Group was established to assist the Special Rapporteur in sketching out the general orientation of the topic in the light of the syllabus prepared in 2000.[2] The Special Rapporteur proposed to address transboundary groundwaters, oil and natural gas, taking a step-by-step approach, beginning with groundwaters.[3] At its sixtieth session, in 2008, the Commission adopted, on the second reading, a preamble and a set of 19 draft articles on the law of transboundary aquifers, with the recommendation that the General Assembly, inter alia, consider the elaboration of a convention on the basis of the draft articles.[4]

2. At the fifty-ninth session, in 2007, the Working Group on Shared Natural Resources, chaired by Enrique Candioti, discussed the issue of oil and gas resources on the basis of the fourth report (A/CN.4/580) submitted by the Special Rapporteur, Mr. Chusei Yamada. In addition to determining that the law of transboundary aquifers should be addressed separately from issues concerning oil and gas resources, the Commission decided to request the Secretariat to circulate to Governments a questionnaire on the subject prepared by the Working Group.[5] At the sixty-first session, in 2009, the Working Group discussed the feasibility of any future work by the Commission on the issue of oil and gas resources on the basis of

[1] *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* and corrigendum (A/57/10 and Corr.1), paras. 518-519.
[2] Ibid., *Fifty-fifth Session, Supplement No. 10* (A/55/10), annex, p. 314.
[3] Ibid., *Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 377.
[4] See General Assembly resolution 63/124.
[5] Ibid., *Fifty-ninth Session, Supplement No. 10* (A/59/10), paras. 161-183.

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a working paper on oil and gas (A/CN.4/608), which had been prepared by Mr. Yamada before he resigned from the Commission. The Working Group decided to have the 2007 questionnaire recirculated and to entrust the author with the responsibility of preparing a study in which the feasibility of any future work by the Commission on oil and gas would be determined through the analysis of written replies from Governments and their comments and observations in the Sixth Committee of the General Assembly, as well as other relevant elements.[6] The present working paper is submitted in compliance with that request.

II. Replies and observations of Governments

3. The Commission received 39 replies from Governments, 19 of which addressed the question of the feasibility of future work by the Commission in the area of oil and gas.[7] In addition, a number of Government representatives made statements on the subject in the Sixth Committee.[8] From those written replies and oral statements, 46 in total, it is clear that the attitudes of Member States differ significantly on the issue of whether the Commission should undertake further work on oil and gas. While some States favour the Commission's embarking on such work, a majority of States expressed the view that the Commission should not. Several other States took a middle-of-the-road view, advising a cautious approach.

4. The first group of States expected the Commission to take up the question of oil and gas.[9] It was stated that there were similarities between groundwaters and oil and gas, not only from a legal point of view but also from a geological perspective, and that, even if a cautious approach was advisable, the same general legal principles seemed to apply in both cases. It was also stated that, even if there were certain differences between groundwater and oil and gas, that did not necessarily warrant a separate approach with regard to gaseous substances and liquid substances other than groundwater. According to this view, the fact that different rules applied to oil and gas did not necessarily require the formulation of a different legal framework for oil and gas, special rules for aquifers could be included in a common legal framework for shared natural resources, and the simultaneous consideration of the rules of international law related to all such resources would enhance the legal quality of the emerging international legal framework. A few other States expected the Commission to develop general rules on transboundary natural resources, whether aquifers or oil and gas, while cautiously recalling that such rules should not be considered in isolation from the issue of maritime boundary delimitation, which would require in-depth study and careful treatment, and that the subject was usually covered by bilateral agreements. Nevertheless, the States that favoured embarking on the question of oil and gas constituted a minority of the States that addressed the issue.

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[6] Ibid., *Sixty-fourth Session, Supplement No. 10* (A/64/10), paras. 187-193.

[7] A/CN.4/607; A/CN.4/607/Add.1. Replies were also received from three other Member States in January and February 2010.

[8] For comments and observations by delegations, see A/C.6/62/SR.22, 24 and 25, A/C.6/63/SR.16-18 and A/C.6/64/SR.17, 18 and 20-23.

[9] References to comments are made in the present working paper to demonstrate a general trend in the views of Member States and are not intended to be exhaustive.

5. The second group of States, which formed a clear majority, asserted that the topic of oil and gas should not be addressed by the Commission. The reasons cited by those States, while varying considerably, included the following points: (a) the question of oil and gas is essentially different from that of groundwater; (b) the issue is closely intertwined with the bilateral interests of the States involved; (c) it cannot be separated from boundary delimitation; (d) it is not suitable for codification; and (e) it involves political sensitivity and technical difficulty. Naturally, some of those reasons are closely interrelated, but they are referred to here for the sake of convenience, with a view to highlighting a general trend in the views of States.

A. Essential difference between aquifers and oil and gas

6. Several States expressed the view that groundwater should be addressed separately from oil and gas deposits, even if some geological factors might suggest the possibility of dealing with the two resources together. Such a limited, geological approach would ignore or underestimate social and economic implications, which differed significantly when it came to groundwater, on the one hand, and oil and gas, on the other. Similarly, the view was expressed that it was important to distinguish the physical or geological characteristics of oil and gas from the legal evaluation of those resources.

B. The question of bilateral nature

7. Many States considered that the question of oil and gas was one that involved the essential bilateral interests of the States concerned and that any attempt to codify general rules would not be appropriate or necessary. It was stated that the question was one to be resolved through negotiation between the States involved, as the topic was already adequately covered by principles of international law and dealt with by States on a bilateral basis. It was not deemed advisable to commence work on the subject of oil and gas, which were of great strategic, economic and developmental importance. Similarly, it was indicated that the specific and complex issues related to transboundary oil and gas reserves had been adequately addressed for a number of years through bilateral cooperation and mutually agreed arrangements, and thus did not seem to be giving rise to insurmountable problems in practice.

C. Boundary delimitation

8. Some States expressed the view that the Commission should not take up the subject of oil and gas because, in many cases, it would be linked to questions related to maritime delimitation. It was emphasized that the development, exploitation and management of transboundary oil and gas naturally presupposed the delimitation of territorial and/or maritime boundaries between two or more States and thus required a case-by-case approach. In particular, it was stressed that the Commission should refrain from considering matters relating to offshore boundary delimitation, as the 1982 Convention on the Law of the Sea undoubtedly stipulated that maritime delimitation was a matter to be addressed by the States concerned: in areas where States had yet to permanently resolve maritime claims, the questions of if and how

oil and gas resources were shared were inextricably linked to the resolution of such claims. Furthermore, the resulting delimitation agreements often contained provisions for the joint exploitation of oil and gas deposits straddling the agreed boundary. Such existing bilateral mechanisms represented the best way forward for States in the management of shared oil and gas reserves.

D. Doubts about suitability for codification

9. Doubts were expressed by several States with regard to the suitability of the topic for the codification exercise. Many States shared the view that the issue of oil and gas did not fall within the scope of international customary law and should be addressed through cooperation and negotiation between the States concerned, and that codification would be neither timely nor realistic. According to other States, the subject was not ripe for codification or was not suitable for codification by the Commission. Some States were not persuaded that further codification work by the Commission on this topic would have any added value, since it might lead to additional complexity and confusion. They considered that it would not be helpful or wise for the Commission to study this area further or to attempt to deduce certain rules of customary international law from the very limited relevant practice. It was also argued that the Commission had no mandate to consider the environmental aspects of fossil and hydrocarbon fuels in the context of the topic. It was further stated that scientific and legal studies had shown that it would be impossible to elaborate universal standards in that area, which had no aspects that could benefit from further elaboration in the context of the Commission's work. As the available relevant practice was bilateral in nature and context-specific, it was more appropriate for application in bilateral negotiations between interested States than for the process of the progressive development and codification of international law.

E. Political sensitivity and technical difficulty

10. It was noted by a number of States that the subject of oil and gas was a complex one that had given rise to considerable difficulties of a political or technical nature. It was also stressed that the Commission should take into account the complexity and sensitivity of the issue. It was stated that it would be advisable for the Commission to exercise caution with regard to this matter. States and industries had immense economic and political stakes in the allocation and regulation of oil and gas resources, and any proposal by the Commission would likely be highly controversial. It was also emphasized that the issue of transboundary oil and gas naturally involved highly technical data and politically sensitive issues, as well as the issue of State sovereignty.

11. In sum, a large number of States believed that the oil and gas issue was essentially bilateral in nature as well as highly political or technical, involving diverse regional situations. They expressed doubts as to the need for the Commission to proceed with any codification process relating to this issue, including the development of universal rules. Moreover, it appeared that those countries would be concerned if the Commission were to broaden the topic to include matters relating to offshore boundary delimitation.

12. The third group of States comprised those that did not clearly indicate their positions. Many States in this group stressed that the Commission must enjoy broad and widespread support among States if it wished to embark on the topic of oil and gas. Some States indicated that, while a codification exercise could not be considered appropriate or necessary, they would nonetheless welcome a study by the Commission on relevant State practice. For example, it was suggested that an analysis of various approaches taken under existing arrangements might lead to a set of common principles and best practices. It was also stated that the Commission might wish to consider conducting a survey on practice related to both inter-State and private contracts in order to shed light on general trends in practice, both in public and private law, which might lead to the proposal of guidelines if necessary.

III. Recommendation

13. It may be recalled that the topic "Shared natural resources" was included in the programme of work of the Commission on the basis of a syllabus prepared by Robert Rosenstock during its fifty-second session, in 2000, which sketched out the general orientation of the topic. It was stated in the syllabus that the Commission should focus "exclusively on water, particularly confined groundwater, and such other single geological structures as oil and gas".[10] There was no specific syllabus concerning the issue of oil and gas resources. It is for this reason that, following the completion of the work on transboundary aquifers, consideration of the feasibility of work on the topic of oil and gas has been warranted.

14. It is generally considered that, in selecting a new topic or sub-topic, the Commission should be guided by the following criteria, as elaborated by the Commission in 1997 and 1998: the topic should reflect the needs of States in respect of the progressive development and codification of international law; the topic should be sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and the topic is concrete and feasible for progressive development and codification.[11] Along the same lines, three feasibility tests were suggested for topic selection: the first was the practical consideration of whether there was any relevant pressing need in the international community as a whole; the second concerned the technical feasibility of the topic — whether it was sufficiently "ripe" in the light of relevant State practice and literature; and the third

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[10] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), annex, p. 314. Differing views were expressed by Commission members as to whether or not a decision had been made by the Commission that oil and gas were included in the topic (see Ibid., *Sixty-second Session, Supplement No. 10* (A/62/10), paras. 169-170 and 177).

[11] See *Yearbook of the International Law Commission, 1997*, vol. II (Part Two), para. 238; Ibid., *1998*, vol. II (Part Two), para. 553. It may be recalled that the Commission further agreed that it should not restrict itself to traditional topics, but could also consider those reflecting new developments in international law and pressing concerns of the international community as a whole.

related to the political feasibility of the topic — whether addressing it might or might not meet with strong political resistance on the part of States.[12]

15. The views of the majority of Member States concerning the issue of oil and gas were largely negative, as summarized above. A majority believed that the question was not only essentially bilateral in nature, but also highly technical, involving diverse regional situations. It was particularly important to distinguish the physical or geological characteristics of oil and gas from the legal evaluation of those resources, and also to note that, as far as oil and natural gas were concerned, each case had its own specific and distinct features and would need to be addressed separately. Doubts were thus expressed as to the need for the Commission to proceed with any codification process relating to this issue, including the development of universal rules. It was feared that an attempt at generalization might inadvertently lead to additional complexity and confusion in an area that had been adequately addressed through bilateral efforts to manage it. Given that oil and gas reserves were often located in continental shelves, maritime boundary delimitation, which, in political terms, was a very delicate and sensitive issue for the States concerned, was a prerequisite for the consideration of this topic, unless the parties had mutually agreed, as in a limited number of cases, to bypass the problem of delimitation.[13]

16. With regard to the middle course of action suggested by a few States, namely, collecting and analysing information about State practice concerning oil and gas or elaborating a model agreement on the subject,[14] that might not be a very fruitful exercise for the Commission, precisely because of the specificities of each case involving oil and gas. The delicate and sensitive nature of certain relevant cases could well be expected to hamper any attempt at sufficiently extensive and useful analysis of the issues involved.

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[12] B.G. Ramcharan, *The International Law Commission: Its Approach to the Codification and Progressive Development of International Law* (The Hague, Martinus Nijhoff, 1977), pp. 60-63; Shinya Murase, *Kokusai Rippo* (International Lawmaking) (Toshindo, 2002) [Chinese translation forthcoming, to be published by Chinese People's Public Security University Press, 2010], pp. 217-221.

[13] See Jonathan Charney, et al., eds., *International Maritime Boundaries*, 4 vols. (Martinus Nijhoff, 1993-); Shinya Murase and Junichi Eto, eds., *International Law of Maritime Boundary Delimitation* (Toshindo, 2008) (in Japanese).

[14] A few attempts were made in the 1980s to elaborate model agreements. See Hazel Fox, et al., *Joint Development of Offshore Oil and Gas: Model Agreement for States for Joint Development with Explanatory Commentary* (1989); Hazel Fox, ed., *Joint Development of Offshore Oil and Gas*, vol. 2 (British Institute of International and Comparative Law, 1990); Alberto Szekely, et al., "Transboundary hydrocarbon resources: the Puerto Vallarta draft treaty", *Natural Resources Journal*, vol. 31, 1991, pp. 609f. (Joint project between a United States university and a Mexican university). It may be noted that the International Committee on the Exclusive Economic Zone stopped short of coming up with a model agreement. See "Joint development of non-living resources in the Exclusive Economic Zone", Report of the International Committee on the Exclusive Economic Zone, International Law Association, *Report of the Sixty-third Conference* (Warsaw), pp. 509-569.

17. Accordingly, the author of the present paper recommends that the Working Group decide, at the sixty-second session of the Commission, in 2010, that the topic of oil and gas will not be pursued any further.[15]

[15] Such a decision is not without precedent in the practice of the Commission. It may be recalled that the topic of the status, privileges and immunities of international organizations had been on the Commission's agenda since 1976 and that two successive Special Rapporteurs had submitted a total of eight reports on that issue. Neither in the Commission nor in the Sixth Committee had the view been expressed that the topic should be more actively considered. Hence, the Commission decided, on the basis of a recommendation of the Planning Group, that the topic should not be pursued, and that decision was endorsed by the General Assembly in 1992.